



**In the Missouri Court of Appeals
Eastern District**

DIVISION TWO

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| STATE OF MISSOURI, |) | |
| |) | Nos. ED96851 & ED96832 |
| Plaintiff/Respondent, |) | |
| |) | Appeal from the Circuit Court |
| v. |) | of the City of St. Louis |
| |) | |
| LEDALE NATHAN, |) | Honorable Robert H. Dierker, Jr. |
| |) | |
| Defendant/Appellant. |) | Date: November 20, 2012 |

Defendant appeals from a judgment entered upon a jury verdict finding him guilty of first-degree murder, in violation of section 565.020 RSMo (2000)¹; two counts of first-degree assault, in violation of section 565.050; ten counts of armed criminal action, in violation of section 571.015; three counts of first-degree robbery, in violation of section 569.020; one count of first-degree burglary, in violation of section 569.160; and four counts of kidnapping, in violation of section 565.110. The offenses arose from a home invasion and robbery in which one victim was killed and two victims suffered gunshot wounds. Defendant was 16 years of age at the time of the offenses and was certified to stand trial as an adult. The court sentenced him to life in prison without probation or parole on the first-degree murder count, life imprisonment on each first-degree assault and first-degree robbery count, fifteen years imprisonment on each

¹ All further statutory references will be to RSMo (2000).

kidnapping count, and fifteen years imprisonment on the first-degree burglary count, to be served consecutively.

Defendant raises seven points on appeal. In his second point, he asserts that section 565.020 is unconstitutional because it mandates the imposition of a sentence of life without parole on an offender under age 18 without consideration of the offender's age. He has moved for transfer to the Missouri Supreme Court. We hold that the Missouri Supreme Court has exclusive appellate jurisdiction of this appeal, and we transfer this appeal to the Missouri Supreme Court.

DISCUSSION

Article V, section 3, of the Missouri Constitution provides that the court of appeals has general appellate jurisdiction in all cases except those within the exclusive appellate jurisdiction of the Missouri Supreme Court. Among the cases that fall within the supreme court's exclusive appellate jurisdiction are those that involve the validity of a state statute. Mo. Const. art. V, sec. 3; *Glass v. First National Bank of St. Louis, N.A.*, 186 S.W.3d 766 (Mo. banc 2005). Defendant challenges the constitutionality of section 565.020. Defendant's challenge to this state statute thus facially falls within the supreme court's exclusive appellate jurisdiction.

However, before we can hold that this challenge deprives this court of jurisdiction, we must determine whether the constitutional issue has been properly preserved for appeal and whether the claim of unconstitutionality is real and not pretextual. If a party has not properly preserved its constitutional claim for appellate review, jurisdiction is vested in this court, and not in the Missouri Supreme Court. See *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159, 160 (Mo. banc 1976); *State v. Bowens*, 964 S.W.2d 232, 236 (Mo.App. 1998). In addition, the claim that the statute is unconstitutional must be real and substantial for jurisdiction to vest in the

Missouri Supreme Court. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. banc 1999). If the challenge is merely colorable, jurisdiction is in this court. *Glass*, 186 S.W.3d at 766.

Preservation

To properly preserve a constitutional issue for appellate review, a party must (1) raise such question at the first available opportunity; (2) designate, by explicit reference, the specific constitutional provision claimed to have been violated; (3) state the facts showing the violation; and (4) preserve such questions throughout for appellate review. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). See also *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008); *Sharp v. Curators of University of Missouri*, 138 S.W.3d 735, 738 (Mo.App. 2003). Additionally, the trial court must have ruled on the issue, and the point raised on appeal must be based upon the theory advanced at the trial court. *Id.*

Defendant has properly raised and preserved the issue of the validity of section 565.020 for appellate review. He first raised this issue in a fourteen-page pretrial motion entitled "**Motion to Declare §565.020.2 RSMo Unconstitutional as it Applies to Juveniles in General and to Ledale Nathan in Particular and to Preclude the Imposition of a Life Without Probation or Parole Sentence.**" In the motion, he listed the constitutional provisions he claimed were violated by the statute. He brought this motion to the trial court's attention in a pretrial conference on the morning of trial, and the court responded that it felt it was bound by *State v. Andrews*, 329 S.W.3d 369 (Mo. banc 2010). Defendant again raised his constitutional challenge to section 565.020 in paragraph 4 of his motion for new trial. He specifically designated the constitutional provisions he claimed were violated, and incorporated by reference his pretrial motion. The trial court denied this claim in a lengthy discussion, citing, *inter alia*,

Andrews, 329 S.W.3d at 369. Further, defendant has raised the same issue in Point II on appeal. Thus, defendant has adequately raised and preserved this constitutional issue for appellate review.

Real and Substantial Claim

A claim is real and substantial when "upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy." Sharp, 138 S.W.3d at 738. However, "if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable." Id.

Defendant argues that section 565.020 is unconstitutional because a mandatory sentence of life without parole does not allow juvenile offenders convicted of first-degree murder committed while under 18 to adduce evidence, including their age, in mitigation of punishment. In Andrews, the Missouri Supreme Court rejected this argument, reasoning that "Missouri's statutory scheme expressly considers the youthfulness of the child before he or she is exposed to the possibility of a mandatory life without parole sentence for first degree murder." 329 S.W.3d at 377.

However, the United States Supreme Court has subsequently held: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Miller v. Alabama, 132 S.Ct. 2455, 2468 (2012). It specified that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Id. at 2469. The Court concluded: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account

how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. Miller thus requires the sentencing court to take into consideration any mitigating circumstances, including the offender's status as a juvenile and the characteristics that accompany juvenile status. As a result of Miller, defendant's constitutional claim is real and substantial.

This appeal involves a real and substantial challenge to the validity of a Missouri state statute that has been properly raised and preserved for appellate review. Accordingly, this case falls within the exclusive appellate jurisdiction of the Missouri Supreme Court. When the Missouri Supreme Court has exclusive jurisdiction, its jurisdiction extends to all issues in the case. Sharp, 138 S.W.3d at 739 (citing State ex rel. State Highway Com'n v. Wiggins, 454 S.W.2d 899, 902 (Mo. banc 1970) and State ex rel. Union Elec. v. Pub. Serv. Com'n, 687 S.W.2d 162, 165 (Mo. banc 1985)).

Conclusion

We order the case transferred to the Missouri Supreme Court where jurisdiction lies. Mo. Const. art. V, sec. 11.


Kathianne Knaup Crane, Presiding Judge

Mary K. Hoff, J. and Lisa Van Amburg, J., concur.